

SUPREME COURT OF ARIZONA

In the Matter of ) Arizona Supreme Court  
 ) No. R-15-0023  
RULES 32, 41, 42 & 66-69, )  
RULES OF THE SUPREME COURT )  
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 ) **FILED 12/16/2015**

## ORDER

AMENDING RULES 41 AND 66-69, RULES OF THE ARIZONA SUPREME COURT

A petition having been filed proposing to amend Rules 41, 42, and 66-69, Rules of the Arizona Supreme Court, and comments having been received, upon consideration,

IT IS ORDERED that Rules 41 and 66-69, Rules of the Arizona Supreme Court, be amended in accordance with the attachment hereto, effective January 1, 2016.

DATED this 16th day of December, 2015.

/s/  
SCOTT BALES  
Chief Justice

TO:

Rule 28 Distribution

Patricia A Sallen

John A Furlong

E Hardy Smith

## ATTACHMENT\*

### RULES OF THE ARIZONA SUPREME COURT

#### Rule 41. Duties and Obligations of Members

The duties and obligations of members shall be:

(a) – (h) [No change in text.]

(i) To protect current and former client interests by planning for the lawyer's termination of or inability to continue a law practice, either temporarily or permanently.

#### Comment [amended 2007 and 2016 Amendment]

[1] Lawyers, whether or not engaged in the practice of law, should act honorably and treat others with courtesy and respect. Unprofessional conduct, as defined by Rule 31(a)(2)(E), during the practice of law may result in discipline pursuant to Rules 41(g) and 53(j). Specific conduct outside the practice of law, such as conviction of a felony, Rule 53(h), or engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation, Rule 42, ER 8.4(c), and Rule 53(a), may also be grounds for discipline.

[2] Lawyers must plan for the possibility that they will be unable or unwilling to discharge their duties to current and former clients or to protect, transfer and dispose of client files, property or other client-related materials. As part of their succession plan, solo practitioners should arrange for one or more responsible transition counsel agreeable to assuming these responsibilities. Lawyers in multi-lawyer firms and lawyers who are not in private practice, such as those employed by government or corporate entities, should have a similar plan reasonable for their practice setting.

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#### Rule 66. Appointment of Conservator to Protect Client Interests

(a) **Appointment of Conservator.** The state bar or any other interested person may petition the presiding judge of a superior court or the presiding judge's designee ("appointing judge") to appoint one or more eligible persons to act as

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\* Additions to text are indicated by underscoring and deletions by ~~strikeouts~~.

conservators of the client files and records, client trust accounts and such other affairs of a lawyer or formerly admitted lawyer, as the appointing judge determines appropriate. There shall be no filing fee for petitions for conservator under this rule. The appointing ~~presiding~~ judge shall appoint a conservator if the lawyer maintains or has maintained a law practice within the county, no partner or other responsible successor to the practice of the lawyer is known to exist, and:

1. the lawyer is made the subject of an order of interim suspension and related matters; or
2. the appointing ~~presiding~~ judge of the ~~superior court~~ by order directs ~~bar counsel~~ the state bar to file an application under this rule; or
3. the lawyer is transferred to inactive status because of incapacity or disability, or disappears or dies; or
4. where other reasons requiring protection of the public are shown.

(b) **Service of Petition.** A copy of the petition and any related order to show cause shall be personally served upon the respondent lawyer, ~~the chief bar counsel for the sState bBar of Arizona~~, and upon other persons as provided in Rule 63 governing transfer to disability inactive status. Upon affidavit of petitioner or the state bar ~~bar counsel~~ that diligent efforts have failed to reveal the whereabouts of respondent, or that respondent is evading service, service shall be made ~~upon the clerk of this court, who shall proceed as provided for in discipline proceedings, except that service shall be final when made.~~ on the respondent by certified mail/delivery restricted to addressee in addition to regular first-class mail, sent to the last address provided by the respondent to the state bar pursuant to Rule 32(c)(3). When service of the petition is made by mail, the state bar shall file a notice of service in the conservatorship matter indicating the time and manner of mailing. Service shall be deemed complete when the notice is filed.

(c) **Hearing on Petition; Order; Authority.**

1. Within seven days of the petition being filed, The ~~the appointing~~ ~~presiding~~ judge of the ~~superior court~~ shall may conduct a hearing on the petition or may rule on the petition without a hearing ~~within seven (7) days of filing.~~
2. If the appointing judge conducts a ~~At the~~ hearing, the petitioner shall have the burden of proving by a preponderance of the evidence that grounds exist for the appointment of a conservator.
3. The ~~presiding~~ appointing judge shall ~~promptly~~ enter an order ~~either~~ granting or denying all or part of the petition. The order shall contain findings of fact and a statement of the grounds upon which the order is based. If no appearance has been entered on behalf of the respondent, a copy of the order shall be served upon respondent in the manner prescribed by section (b) of this rule.
4. The parties may request and the appointing judge may make any other rulings as justice requires.

**(d) Effect of Petition.** The filing of a petition for the appointment of a conservator under these rules shall be deemed, for purposes of any statute of limitations or limitation on time for appeal or vacation of a judgment, as the timely filing in the superior court or other proper court of this state, on behalf of every client of the respondent, of a complaint or other proper process commencing any action, proceeding, appeal or other matter arguably suggested by any information appearing in the files of the respondent if:

1. the application for appointment of a conservator is granted; and
2. substitute counsel actually files an appropriate document in a court within thirty (30) days after executing a receipt for the file relating to the matter.

(e) The clerk of the superior court shall make certified copies of the order of appointment available upon request of the conservator without charge.

#### **Rule 67. Duties of Conservator**

**(a) Possession of Files.** The conservator shall take immediate possession or control of all files, ~~and~~ papers and records of the respondent, including computer data and related storage, if the conservator deems it necessary. If such possession cannot be obtained peaceably, the conservator shall apply to the appointing ~~court~~ judge for issuance of a warrant authorizing seizure of the files. Probable cause for issuance of such a warrant shall be an affidavit executed by the conservator reciting the existence of the conservatorship and the fact that the persons in control of the premises where the files are or may be located will not consent to a search for, or removal of the files, or other facts showing that the files cannot be obtained without the use of the process of the court.

**(b) Inventory.** The conservator shall make a ~~written inventory~~ reasonable assessment of all files, papers and records, including computer data and related storage, taken into the conservator's possession or control. The conservator shall then make a written inventory of all files in which the respondent appeared to be actively representing a client, of all files in which the representation appeared to terminate less than five years prior to the conservatorship being granted, and older files that may reasonably require further evaluation. For purposes of this rule, files that may require further evaluation include original wills, other trust and estate documents, and documents from capital criminal cases.

**(c) Written Notice to Clients of Conservatorship.** The conservator shall send written notice to all clients listed in the inventory ~~of the respondent~~ of the fact of the appointment of a conservator, the grounds that required such appointment, and the possible need of the clients to obtain substitute counsel. Written notice shall be by first class mail to the client's last known address, as ascertained from a review of the client's

file.

**(d) Return of Files.** A file in the conservator's possession or control shall ~~may~~ be returned to a client upon the execution of a written receipt, or released to substitute counsel upon the request of the client and execution of a written receipt by such counsel.

**(e) ~~(e)~~ Termination of Conservatorship.** Six months after sending written notice to clients as described in section (c), the conservator may move the appointing judge for an order discharging the conservator. ~~Upon the termination of the conservatorship, the conservator shall file all such receipts with the court. The motion shall include a report of the disposition and attempted disposition of all inventoried files. Upon discharge of the conservator, the appointing court may order the conservator to destroy all files and records not returned pursuant to section (d) or not previously destroyed. When six (6) consecutive months have passed without any activity, the conservator may apply to the court for an order discharging the conservator. Thereafter, the files and papers of the respondent will be maintained by the state bar in accordance with the state bar's file retention policy as approved by the Board of Governors.~~

**(f) ~~(d)~~ Conservator-Client Relationship.** Neither the conservator nor any partner, associate or other lawyer practicing in association with the conservator shall:

1. make any recommendation of counsel to any client identified as a result of the conservatorship in connection with any matter identified during the conservatorship; or
2. represent such a client in connection with:
  - A. any matter identified during the conservatorship; or
  - B. any other matter during or for a period of three (3) years after the conclusion of the conservatorship.

**(g) Filing a Written Report.** The conservator shall file a written report with the appointing judge not later than thirty (30) days after the date of appointment, advising the court of the status of efforts to comply with the requirements as set forth in paragraphs (a) through (d) of this rule. Thereafter, the conservator shall file a similar written report every sixty (60) days until discharged.

**(h) Request to Destroy Files.** After taking possession or control of files, papers and records of the respondent, the conservator may move the appointing judge for an order granting permission for the conservator to destroy files.

## **Rule 68. Conservator; Bank and Other Accounts**

**(a) Notification of Financial Institutions.** A conservator shall notify all banks and financial institutions in which the respondent maintained either professional

or trustee accounts of the appointment of a conservator under these rules. Service on a bank or financial institution of a ~~certified~~ copy of the order of appointment of the conservator shall operate as a modification of any agreement of deposit among such bank or financial institution, the respondent and any other party to the account so as to make the conservator a necessary signatory on any professional or trustee account maintained by the respondent with such bank or financial institution. ~~The clerk of the superior court shall make certified copies of the order of appointment available upon request of the conservator without charge.~~ The appointing court on application may order that the conservator ~~shall~~ be sole signatory on any such account to the extent necessary for the purposes of these rules and may direct the disposition and distribution of client and other funds following a determination that the clients or third parties are entitled to the funds.

(b) **Client Funds.** The conservator shall return all client funds in the custody of the respondent to the clients as soon as possible, allowing for deduction of expenses or other proper charges owed by the clients to the respondent.

(c) **Sufficient Funds.** Whenever it appears that sufficient funds are in the possession of the conservatorship to permit the return of all client funds in the custody of the respondent, and otherwise to complete the conservatorship and pay its expenses authorized under these rules, the conservator shall permit the respondent or the respondent's estate to take full possession of any remaining funds in the respondent's personal or operating accounts. After reimbursement to the conservator of costs and expenses, ~~a~~Any remaining funds or monies being held in respondent's trust account shall be directed and distributed by order of the appointing judge ~~court~~ to the Client Protection Fund.

(d) **Assessment of Costs. Certification of Payment of Expenses and Compensation of Conservator.**

1. The appointing judge shall award the conservator the costs and expenses of the conservatorship proceeding, including all costs resulting from the duties imposed by Rule 68.
2. The necessary expenses and any compensation of a conservator shall, if possible, be paid by the respondent or the respondent's estate.
3. ~~If not so paid, the conservator may apply to the board for payment. The board shall direct that all of the necessary expenses and all or a portion of the requested compensation be paid as a cost of disciplinary administration and enforcement or from any other source it deems appropriate. The necessary expense and reasonable compensation for the conservator as determined by the board shall be assessed against the respondent as set forth in Rule 65 whether paid by the state bar or not. Necessary expenses and reasonable compensation of a conservator to be paid by the state bar shall be determined by the board and shall not exceed \$10,000 unless extraordinary circumstances exist. Upon application for reinstatement or readmission by the respondent, the costs and~~

~~expenses and compensation paid by the state bar shall be reimbursed and such amounts not previously paid to the conservator shall then be paid. If the conservator is the state bar, the respondent must pay costs and expenses prior to applying for reinstatement or readmission.~~

~~(e) — **Assessment of Costs.** Costs and expenses of conservatorship proceedings shall be determined, assessed, and enforced as provided for in disciplinary proceedings.~~

## **Rule 69. Liability of Conservator**

The general law of conservators and fiduciaries shall apply to the conduct of the conservator and the conservatorship, except that a conservator appointed under these rules shall:

(a) not be regarded as having an attorney-client relationship with clients of the respondent, except that the conservator shall be bound by the obligation of confidentiality toward clients imposed by the Arizona Rules of Professional Conduct with respect to information acquired as conservator;

(b) have no liability to the clients of the respondent or any other person except for injury ~~to such clients~~ caused by intentional, willful, or grossly negligent breach of duties pursuant to Rules 66-69, Ariz. R. Sup. Ct. ~~as a conservator~~; and

(c) be immune to separate suit brought by or on behalf of the respondent or respondent's estate or other person. Any objections by or on behalf of the respondent or any other person to the conduct of the conservator shall be raised in the appointing court during the pendency of the conservatorship.